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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1931.

No. 296

UNITED STATES NAVIGATION COMPANY INC.
Petitioner

AGAINST

CUNARD STEAMSHIP COMPANY, LTD., OCEANIC STEAM NAVIGATION COMPANY, LTD., *et al*
Respondents

MEMORANDUM FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petition for the writ pending argument of the appeal, as authorized by Sec. 240(a) of the Judicial Code, was denied May 19, 1930 (281 U. S. 759). The appeal was argued in the Circuit Court of Appeals for the Second Circuit October 22, 1930, and was decided by that Court May 18, 1931, affirming the decision of the District Court, which had been brought into question here by the first petition.

The further petition now presented to this Court does not differ in any major or essential particular from the first petition which this Court denied, except that the record now contains the decision of the Circuit Court of Appeals with dissenting opinion.

The opinion of A. N. Hand, *C. J.* (Rec. 104-117) shows that this appeal received thorough consideration in the Circuit Court of Appeals. We refer this Court particularly to his statement at Rec. 110: "* * * the gravamen of the

cause of action in the case at bar was the unreasonableness of the agreed rates of carriage, * * *." The discussion following the same to Rec. 114 is a fair demonstration that complaint by a private person of alleged unreasonable rates or practices must be dealt with exclusively by the United States Shipping Board under the Shipping Act, 1916 before resort may be had to the courts.

This conclusion only accords with that which has been stated by this Court on many occasions, to the effect that matters involving determination of facts in respect of rates, practices, etc. of rail carriers must be dealt with in the first instance by the Interstate Commerce Commission. This Court has also frequently held the same in respect of other commissions and administrative bodies. We refer to: *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 440; *Robinson* v. *Baltimore & Ohio R. R. Co.*, 222 U. S. 506, 509; *Mitchell Coal Co.* v. *Pennsylvania R. R. Co.*, 230 U. S. 247, 255-257; *Baltimore & Ohio R. R. Co.* v. *Pitcairn Coal Co.*, 215 U. S. 481, 494-495; *Texas & Pacific Ry. Co.* v. *American Tie & Timber Co.*, 234 U. S. 138, 146; *Keogh* v. *Chicago & N. W. Ry. Co.*, 260 U. S. 156, 161-162; *Western & Atlantic R. R. Co.* v. *Georgia Public Service Commission*, 267 U. S. 493, 497; *Midland Valley R R. Co.* v. *Barclay*, 276 U. S. 482, 484; *Board* v. *Great Northern Ry.*, 281 U. S. 412, 421; *Lewis-Simas-Jones Co.* v. *Southern Pac. Co.*, 283 U. S. 654, 661; *Moore* v. *New York Cotton Exchange*, 270 U. S. 593, 603; *Cosmos Co.* v. *Gray Eagle Co.*, 190 U. S. 301, 308. See also *Sullivan* v. *Union Stock Yards Co.*, 26 F. (2d) 60, 62.

Sec. 22 of the Interstate Commerce Act provides that it "shall not in any way breach or alter the remedies * * * existing at common law or by statute" and that its provisions "are in addition to such remedies". Such provision was not carried into the Shipping Act.

Petitioner seeks to avoid the effect of these decisions, claiming that the gist of the action is combination and conspiracy to restrain trade and commerce and attempt to monopolize the same by procuring exclusive patronage contracts, and that the allegations of the complaint "as to the rates themselves are merely descriptive of the means used to coerce the shippers into making the contracts. The reasonablness of either the contract rate or general tariff rate is not in issue" (Pet. 5-6).

However, this contention of the petition to which we have just referred does not necessarily accord with the allegations in paragraphs 24-30 of the amended complaint (Rec. 14-20), which clearly appear to reiterate the general proposition that the differential or spread between the contract rate and the open tariff rate is arbitrary or unreasonable because not conditioned on volume of traffic, number or regularity of shipments, difference in service, etc., etc.—see end of paragraph 24. The very words "arbitrary", "unreasonable", "disproportionate", "exorbitant", etc., as applied to differentials in rates serve only to raise at the very outset far-reaching questions of fact which now for many years have been considered by our Courts appropriate in the first instance only for the administrative body.

Indeed, the question sought to be raised by the complaint was dealt with in a proceeding conducted by the Shipping Board November [illegible] 1926, entitled "Ex Parte 5, Contract Rate Investigation", on which occasion counsel for the petitioner stated, among other things:

"There are practical necessities for exclusive contracts.

"The statute, however, provides, and I would have your attention directed to this: as I think Mr. Campbell suggested, that while the deferred rebate is specifically prohibited by the statute, the exclusive contracts are not, and the statute provides that only unfair—I think the language

is unjustly discrminatory contracts shall be prohibited. I had rather thought that somewhere in this proceeding we would come at what seemed to me the real question, namely, what is an unfair contract? By what means are we to determine whether or not it is unfair? I had thought out in a very general way that question, and I may state it now and hope that it may be of some assistance to the Board.

"It seems to me that the exclusive contract may have three points of abuse—first, the differential between the contract rate and the open rate may be very slight, or it may be very large. I think that point has not been touched on. The decision of Judge Lacombe in the old *Prince Line* case has been referred to and Judge Lacombe, I think, very ably points out—and I think it is in economics a good law now as it was then—that a reasonable concession in amount is quite lawful and quite necessary. The amount which he mentioned was 10 per cent.

"Now whether in any particular trade or any particular contract, 10 per cent is fair or unfair, I do not know, but I do think that the difference between the open rate and the contract rate is an important element in determining whether the exclusive contract rate is within or without the statute. I feel quite certain that a 50 per cent differential is at least not for the best interests of all concerned. Probably, undoubtedly, 5 per cent differential is. I wish to throw that out merely as one of the criteria by which the fairness is to be determined. I think another is connected with the time when the epidemic of exclusive contracts breaks out. It scarcely seems possible that the only object of an exclusive contract is to benefit the shipper when there are no exclusive contracts in a trade until the competitor appears. It therefore seems to me that some inquiry would be pertinent as to whether exclusive contracts are day in and day out occurrences in all these trades, or whether they are synchronized with the advent of competition. There is a suggestion that Congress thought that was material in section 19, I think it is, of the statute.

"The third element which seems to me to enter into the question of determining whether a contract practice is reasonable, is that of interlocking arrangements. I can think of possible unfairness in making a contract rate to ports A, B and C, dependent on that shipper signing up an exclusive contract to ports D and E because conditions might be very different, and there might be other motives as to ports D and E than merely benefiting the shipper."

Necessity of resort to the Shipping Board to investigate and determine the administrative questions put forward by the complaint cannot be circumvented by mere argument on the pleadings. A motion to dismiss, like a demurrer, does not admit conclusions, but only admits facts well pleaded, and that for the purpose of the argument only. Facts are not established as such so as to be the basis for affirmative action except by proof. *Missouri Pacific R. Co.* v. *Norwood*, 283 U. S. 249, 254; *St. Louis etc. R. R.* v. *United States*, 267 U. S. 346, 349; *Straus* v. *Foxworth*, 231 U. S. 163, 168; *Pierce Oil Co.* v. *City of Hope*, 248 U. S. 498, 500; *Equitable Life Assurance Co.* v. *Brown*, 213 U. S. 25, 43. It is merely assuming a conclusion to say that the acts described in the complaint exist as unlawful acts because of the motion to dismiss. See *Cosmos Co.* v. *Gray Eagle Co.*, 190 U. S. 301, 308. To decide whether or not there has in truth been a violation of either the Shipping Act or the Sherman Act requires thorough-going investigation into the complicated structure of the North Atlantic steamship trade and the rate structure prevailing therein, both on contract and open tariff basis, with consideration of the purposes, benefits and effects thereof. It would appear almost beyond argument that such a task is of an administrative nature, and not for the courts until after the jurisdiction conferred on the Shipping Board by the Shipping Act, 1916 has been exercised. As was said in the opinion of the Circuit Court of Appeals (Rec. 111), "We have no doubt that the questions arising in this case should be passed upon by the Shipping Board, and that the Shipping Act created a tribunal adapted to exercise this precise function".

We are at a loss to understand petitioner's contention that the Shipping Act was not intended to repeal the Sherman

Act and the Clayton Act. The dissenting opinion in the Circuit Court of Appeals seems to fall into like error with that of the petitioner in this respect (Rec. 118). Those statutes have and retain their place just as the Shipping Act has its place. To hold that certain questions must first be presented to the Shipping Board under the Shipping Act is not to hold that those other statutes are repealed or modified in any way. The Shipping Act itself provides a complete remedy and provides for court review of Shipping Board decisions. At the utmost, therefore, it can only be said that remedies (if any exist) under statutes other than the Shipping Act are deferred until after the Shipping Board has exercised its powers.

The complaint proceeds on the theory that the respondents have failed to file with the Shipping Board for approval, pursuant to Section 15 of the Shipping Act, the "agreement" under which the complaint charges the respondents are acting in combination and conspiracy, etc. The complaint fails to state, however, that these respondents have filed with and secured approval from the Shipping Board of the basic agreement under which they are acting in the Conference authorized by the Shipping Act. The approval by the Shipping Board was a governmental act and subject to judicial notice. We therefore annex copy of the agreement as Appendix hereto. *Caha* v. *United States*, 152 U. S. 211, 221-222; *Smith* v. *Asphalt Company*, 12 Fed. (2d) 14, 15; *Morgan, etc. Co.* v. *Isaac Joseph Iron Co.*, 243 Fed. 149, 152.

The complaint also fails to recognize that the matters set forth in reality concern only rates and practices of carriers as between the carrier and the shipping public, and do not constitute a matter of agreement between the carriers themselves. Nobody in the shipping world has yet supposed that

it was necessary to submit to the Shipping Board, for approval prior to performance, contracts between carrier and shipper—although such contracts are subject to regulatory action of the Board under other sections of the Shipping Act.

The contention that because in the case of *Eden Mining Co.* v. *Bluefields Fruit and Steamship Co.* the Shipping Board disapproved a certain contract (Rec. 50-63) the Board is foreclosed from any approval of the contracts referred to in the complaint is wholly without merit. The Board there expressly disclaimed making a decision of general application, sayng (Rec. 57-58):

"It should be here remarked, however, that we do not decide whether under that (Shipping) Act the according of lower rates to those shippers who contract to confine their shipments to a certain carrier or carriers are lawful when based upon regularity of consignments, during a shipment or quantity of merchandise furnished for transportation, as in the instant case no such question is presented for determination."

The *Eden Mining* case was decided in 1922, whereas the Contract Rate Investigation referred to *supra* was held in 1926. The mere holding of the investigation showed that the Board considered the question of contract rates an open one. It remained so by virtue of the action of the Board on February 23, 1927, dismissing its proceeding pursuant to the report which was made by its Bureau of Regulation. The petitioner could with equal propriety contend that the Court could not decide this case adversely, as it contends that the Shipping Board could not legally approve the contract rate practice complained of.

The District Judge at New Orleans, when denying the motion to dismiss in *New Orleans Corrugated Box Co.* v.

Luckenbach S. S. Co., filed no opinion. We do not see that his decision, rendered before the decision of the Circuit Court of Appeals here, and without any statement of reasons, creates substantial ground for citing a difference of opinion as between circuits.

The essence of this case is that the pettitioner, an aggressive competitor of the respondents, prefers to invoke the injunctive power of the courts rather than that of the Shipping Board. The petition and brief do not disclose any reason why the injunctive power of the Shipping Board, enforceable as it is by court order under Sec. 29 of the Shipping Act, would not be equally efficacious with that of the courts *if* the petitioner should succeed in establishing a just cause. The facilities and powers possessed by the Shipping Board for investigating these matters is far superior to that possessed by the courts, and every reason of policy and convenience dictates that the petitioner should be remitted to proceeding first before the Board.

It is respectfully submitted that the petition should be denied.

New York City,
September, 1931.

ROSCOE H. HUPPER
CHARLES C. BURLINGHAM
Counsel for Respondents

APPENDIX

Bureau of Regulation
Conference Agreement No. 16
Dated: March 7, 1929
Filed: March 14, 1929
Approved: March 19, 1929.

On motion duly made and seconded, it was, after discussion, Resolved:

WHEREAS, there was filed with the United States Shipping Board on or about February 24th, 1917, Liverpool, London, Manchester and Glasgow Rate Agreements which had been entered into in behalf of the several Lines named respectively therein, and showing, among other things, that said Lines were then in agreement on minimum rates in the respective services covered by said several rate agreements, and had for some years prior thereto met to agree on rates, which practice has been followed up to the present time, and on or about March 23, 1920, the United States Shipping Board was advised that the Bristol City Line, Ellerman's Wilson Line, Head Line and Thomson Line had joined in consideration of minimum rates with the other Lines mentioned in the aforesaid minimum rate agreements, so that with the addition of the American Merchant, Oriole and U. S. Lines on March 4th, 1925, and the Royal Mail Steam Packet Co. on August 6th, 1925, the Lines participating in the making of agreements as to minimum rates now are, as follows:

American Line
American Merchant Lines
Anchor Line
Anchor-Donaldson Line
Atlantic Transport Line
Bristol City Line
Canadian Pacific Steamships, Ltd.
Cunard Line
Dominion Line
Donaldson Line
Ellerman's Wilson Line
Furness Lines
Head Line and Lord Line
Lamport and Holt Line
Leyland Line

Manchester Liners, Ltd.
Oriole Lines
Royal Mail Steam Packet Co.
Thomson Line
United States Lines
White Star Line

and

WHEREAS, the said several Lines above named operating under the aforesaid rate agreements on account of expanding some of their services so as to include additional ports, assumed for convenience with respect to the aforesaid four rate agreements the general designation of North Atlantic United Kingdom Freight Conference, of which the United States Shipping Board was advised on or about April 30th, 1920, which Conference has thereafter to this date been designated as Conference No. 16, but there has been no formal agreement between the aforesaid Lines, in view of which it is now desired to clarify the purposes of said so-called North Atlantic United Kingdom Freight Conference.

NOW, THEREFORE, it is stated and agreed as follows:

1. The membership of said North Atlantic United Kingdom Freight Conference is composed of the several Lines hereinabove named.

2. The purpose of said Conference is to agree on reasonable minimum freight rates over said Lines, from North Atlantic ports of the United States and Canada to the several United Kingdom Ports, and in all such ways as may be proper to endeavor to stabilize and otherwise improve the steamship and export trade.

3. Said Lines shall not unjustly discriminate against, or make any discounts, payments, rebates or returns of any description, directly or indirectly, to any shipper, contractor, broker (except brokerage), consignee or other receiver of cargo.

4. The meetings of said Conference shall continue to be held at New York or Montreal monthly, or thereabouts, to consider matters of rates and other matters of general interest to the export and steamship trade.

5. Any person, firm or corporation engaged in operating vessels regularly in the trade, may be admitted to member-

ship in the Conference upon agreeing to conform to this resolution and such rules and regulations as may be adopted by the Conference.

And on further motion duly made and seconded it was

RESOLVED that the Secretary be directed to file with the United States Shipping Board for approval under Section 15 of the Shipping Act the foregoing agreement with copy of this resolution.

Filed on behalf of:

American Line
American Merchant Lines
Anchor Line
Anchor-Donaldson Line
Atlantic Transport Line
Bristol City Line
Canadian Pacific Steamships, Ltd.
Cunard Line
Dominion Line
Donaldson Line
Ellerman's Wilson Line
Furness Lines
Head Line and Lord Line
Lamport and Holt Line
Leyland Line
Manchester Liners, Ltd.
Oriole Lines
Royal Mail Steam Packet Co.
Thomson Line
United States Lines
White Star Line

By: SIDNEY E. MORSE, Secretary,
The North Atlantic United Kingdom
Freight Conference.